

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

TIMOTHY HENDERSON,	)	
	)	
Plaintiff,	)	3:11-CV-00088-LRH-RAM
	)	
v.	)	
	)	<u>ORDER</u>
MASCO FRAMING CORPORATION,	)	
	)	
Defendant.	)	
_____	)	

Presently before the court is plaintiff Timothy Henderson's ("Henderson") joint motion to compel arbitration and for attorney's fees. Doc. #8.<sup>1</sup> Defendant Masco Framing Corporation ("Masco") filed an opposition (Doc. #9) to which Henderson replied (Doc. #12).

Also before the court is defendant Masco's motion for judgment on the pleadings. Doc. #11. Henderson filed an opposition (Doc. #13) to which Masco replied (Doc. #14).

**I. Factual Background**

This action involves alleged violations of the Sarbanes-Oxley ("SOX") Act, breach of contract, breach of the covenant of good faith and fair dealing, and tortious discharge claims arising out of Henderson's involuntary discharge from his employment with Masco.

In May 2007, Masco acquired Henderson's prior employer, the Erickson Companies, where

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<sup>1</sup> Refers to the court's docket number.

1 Henderson had been employed for nineteen years. Henderson retained his employment and  
2 received a retention bonus, a severance agreement, and stock and investment-related benefits as a  
3 result of the acquisition. As part of the retainer agreement, Henderson's retention bonus was to be  
4 held in escrow by Masco and distributed to Henderson in three annual installments beginning in  
5 December 2007. The agreement allegedly stipulated that the escrow agent would not pay any  
6 employer portion of FICA taxes.

7 In December 2007, Henderson received the first installment of his retention bonus, from  
8 which Masco had withheld the employer portion of the FICA Medicare tax and reported this tax  
9 amount as income on his W2 tax form. Henderson complained, but Masco insisted that the escrow  
10 agreement allowed them to withhold the FICA tax.

11 In March 2008, the President and Chief Operating Officer of Masco, Rob Brown  
12 ("Brown"), verbally promised Henderson a bonus equal to one half of Henderson's annual salary  
13 for the years 2008 and 2009. Later that year, in December 2008, Henderson received the second  
14 installment of his retention bonus, from which the FICA Medicare tax had again been withheld, but  
15 Masco again refused to address Henderson's renewed complaints. Thereafter, Henderson received  
16 the promised bonus for 2008.

17 In August 2009, Henderson was involuntarily dismissed from his employment and received  
18 his final retention bonus installment, from which the FICA taxes had again been withheld, but was  
19 not paid the promised 2009 bonus.

20 In September 2009, Henderson filed a complaint with the Occupational Safety and Health  
21 Administration ("OSHA") of the Department of Labor and, in January 2010, filed a charge of  
22 discrimination against Masco with the Equal Employment Opportunity Commission ("EEOC").  
23 Henderson's EEOC action was eventually dismissed, but his OSHA claim reached the Office of the  
24 Administrative Law Judges ("ALJ") and continued until Henderson's motion to stay pending  
25 arbitration and/or mediation was granted on September 16, 2010. No mediation or arbitration  
26 between Henderson and Masco ever took place.

1 Subsequently, on February 8, 2011, Henderson filed the instant complaint against Masco,  
2 alleging four causes of action: (1) violations of the whistle-blower protection provisions of the  
3 SOX Act, (2) breach of contract, (3) breach of the covenant of good faith and fair dealing, and (4)  
4 tortious discharge. Doc. #1. Henderson alleges that his termination was an act of retaliation by  
5 Masco to punish him for complaining about the FICA tax money that was withheld from his bonus  
6 payments. Thereafter, Henderson filed the present motion to compel arbitration and for attorney's  
7 fees. Doc. #8

## 8 **II. Legal Standard**

9 The Federal Arbitration Act ("FAA"), found at 9 U.S.C. §1 *et seq.*, requires a district court  
10 to stay judicial proceedings and compel arbitration of claims covered by a written and enforceable  
11 arbitration agreement. 9 U.S.C. § 3. In determining whether to compel arbitration under the FAA,  
12 the court must determine whether: (1) there is an agreement between the parties to arbitrate; (2) the  
13 claims at issue fall within the scope of the agreement; and (3) the agreement is valid and  
14 enforceable. *Lifescan, Inc. v. Permier Diabetic Services, Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004).

## 15 **III. Discussion**

16 In his motion to stay the proceedings and compel arbitration, Henderson argues that the  
17 court should compel arbitration because: (1) there is an arbitration agreement between himself and  
18 Masco elaborated in Masco's dispute resolution policy; (2) the arbitration agreement applies to the  
19 claims in his complaint; and (3) the FAA governs the enforcement of the dispute resolution  
20 agreement and its arbitration provisions. *See* Doc. #8.

21 In its opposition, Masco argues that Henderson's motion should be denied because: (1) the  
22 arbitration agreement is invalid on its face, as it was never signed by Henderson; (2) the recent  
23 Dodd-Frank Act retroactively bars arbitration of Henderson's SOX claim; and (3) even if the  
24 arbitration agreement is valid, Henderson's breach of contract and breach of the covenant of good  
25 faith and fair dealing claims should not be submitted for arbitration because the one-year statute of  
26 limitations elaborated in that agreement has run. *See* Doc. #9.

1           **A. Validity of the Mediation/Arbitration Agreement**

2           The court must first address whether the dispute resolution policy, and, specifically, the  
3 arbitration agreement contained therein, is valid and binding. The court is unconvinced by Masco's  
4 argument, centered around the century-old case of *Tonopah Lumber Co. v. Riley*, 95 P. 1001, 1003  
5 (Nev. 1908), that the policy is not binding as it is "unexecuted," or unsigned. Initially, the court  
6 notes that Masco's synopsis of *Tonopah Lumber*, that an "unexecuted contract is not considered to  
7 be a complete or genuine instrument," is a mischaracterization of the holding. In *Tonopah Lumber*,  
8 the contract at issue was not merely unsigned, it was also "incomplete according to its terms" and  
9 there was conflicting evidence as to "whether it was . . . the intention of the parties to enter into a  
10 contract containing the terms and conditions" of the agreement. 95 P. at 1003.

11           Further, in contrast to Masco's position, all that is required for the valid formation of a  
12 contract under Nevada law is that there be an offer, acceptance, a meeting of the minds, and  
13 consideration. *See Mack v. Estate of Mack*, 206 P.3d 98, 108 (Nev. 2009). Whether an agreement  
14 was signed or executed is generally not dispositive of the formation of a contract.

15           Here, the facts establish the existence of a contractual agreement between Henderson and  
16 Masco to arbitrate employment claims. Masco informed Henderson of its dispute resolution policy  
17 and its arbitration provisions prior to Masco's acquisition of the Erickson companies. *See* Doc. #9,  
18 Exhibit D (a Management Confidentiality Agreement ("MCA"), signed by Henderson in April  
19 2007, which incorporates the dispute resolution policy into its terms and which explicitly provides  
20 that "Employee acknowledges that [he] has had an opportunity to review the [dispute resolution  
21 policy]."). Further, the dispute resolution policy itself specifically states that agreement to the  
22 policy is "a condition of continued employment." Doc. #9, Exhibit B. Thus, although no signed  
23 copy of the dispute resolution policy appears to exist, the court finds that Henderson was familiar  
24 with the existence of the policy and knew that agreement to its terms was a mandatory condition of  
25 his employment. Henderson's affirmation of the policy in the MCA and his employment with  
26 Masco for over two years establish mutual agreement to the terms of the policy. Thus, the dispute

1 resolution policy constitutes a valid contract between Henderson and Masco.

2 **B. SOX and the Dodd-Frank Act**

3 Because the court finds that the arbitration agreement is valid, the court must now consider  
4 whether Henderson's claim for alleged violations of the SOX Act falls within the provisions of the  
5 agreement. The SOX Act provides protection for whistleblowers, stating that publicly traded  
6 companies are prohibited from "discharg[ing], demot[ing]," or otherwise harming or threatening an  
7 employee because of a lawful act done by the employee to provide information about company  
8 conduct that the employee believes to be unlawful. 18 U.S.C. § 1514A. While SOX claims were  
9 arbitrable at the time the law was originally enacted, the recent Dodd-Frank Act, enacted in July  
10 2010, amended Section 1514A to prohibit arbitration of SOX claims. 18 U.S.C. § 1514A(e)(2)  
11 ("No predispute arbitration agreement shall be valid or enforceable, if [it] requires arbitration of a  
12 dispute arising under this section."). As Henderson is attempting to enforce a dispute resolution  
13 policy over a SOX claim, the question before this court is whether Dodd-Frank applies retroactively  
14 to arbitration agreements that existed prior to July 2010.

15 Applying legislative enactments retroactively is typically disfavored. *See Landgraf v. USI*  
16 *Film Products*, 511 U.S. 244, 264 (1994). The Supreme Court has barred the retroactive  
17 application of "genuinely" retroactive statutes, but allows certain types of statutes, statutes which  
18 do *not* have "genuinely" retroactive effects—such as those that deal with the propriety of injunctive  
19 relief, those that address the question of a particular court's jurisdiction, or those that change  
20 procedural rules—to be applied in a quasi-retroactive manner. *See id.* at 273-79. A statute has a  
21 "genuinely" retroactive effect when its application to previous actions or conduct would "impair  
22 rights a party possessed when he acted, increase a party's liability for past conduct, or impose new  
23 duties with respect to transactions already completed." *Id.*, at 277, 280. The key question in the  
24 instant case, then, is whether the Dodd-Frank Act's updated SOX provisions, contained in Section  
25 922 of the Act, would have a "genuinely" retroactive effect if applied to past conduct. Due to its  
26 recent passage, very little case precedent interpreting Dodd-Frank exists. Nevertheless, the parties

1 have presented the court with two non-binding, diametrically-opposed cases supporting their  
2 respective positions.

3 Henderson relies on *Riddle v. DynCorp International Inc.*, 733 F. Supp. 2d 743 (N.D. Tex.  
4 2010), to support his contentions that Dodd-Frank provides an explicit date on which Section 922  
5 would become effective and, therefore, the Act's amendments to SOX arbitration cannot apply  
6 retroactively. In *Riddle*, the district court, examining the Dodd-Frank Act's alteration of the statute  
7 of limitations for False Claims Act ("FCA") claims, took the "Effective Date" contained in  
8 Section 4 of the Act at face value. 733 F. Supp. 2d at 748. Section 4 stated that "[e]xcept as  
9 otherwise specifically provided in this Act or the amendments made by this Act, this Act and such  
10 amendments shall take effect 1 day after the date of enactment of this act." Dodd-Frank Wall  
11 Street Reform and Consumer Protection Act, Pub.L. No. 111-203, 124 Stat. 1376 (2010). Because  
12 no alternative effective date was provided in the section of the Dodd-Frank Act pertaining to FCA  
13 claims, the court stated that, based on the "plain language of the Act," it could "only conclude that  
14 it was *not* retroactive." *Riddle*, 733 F. Supp. 2d at 748.

15 In opposition, Masco cites *Pezza v. Investors Capital Corp.*, 2011 WL 767982 (D. Mass.  
16 Mar. 1, 2011), to support its contentions that the effective date of Section 922 is ambiguous and  
17 that a retroactive application of these provisions is proper. The district court in *Pezza* engaged in a  
18 lengthy analysis of the Dodd-Frank Act before determining that, under the plain language of the  
19 statute, Congress's intent concerning the retroactivity of Section 922 was unclear. *Id.* at \*6.  
20 Allegedly acting under the impetus of Supreme Court precedent as elaborated in cases such as  
21 *Landgraf*,<sup>2</sup> the court then examined the practical consequences of allowing Section 922 to apply  
22 retroactively. *Id.* at \*6-8. Asserting that a retroactive application of Section 922 would merely  
23 affect the conferral of jurisdiction—a procedural right—rather than the substantive rights of the  
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25 <sup>2</sup> See 511 U.S. at 274 (stating that the Court has "regularly applied intervening statutes  
26 conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred  
or when the suit was filed").

1 parties, the court held that Section 922 qualifies as just the sort of quasi-retroactive statutory  
2 provision that can be applied retroactively because it does not have a “genuine” retroactive effect.  
3 *See Id.* at \*8

4 In considering the facts of the instant case and the precedent cited by the parties, this court  
5 notes three important points regarding the retroactivity of congressional statutes. First, as has been  
6 mentioned above, “[r]etroactivity is not favored in the law.” *Landgraf*, 511 U.S. at 264 (quoting  
7 *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). Second, for this reason, there is  
8 typically a “presumption against statutory retroactivity.” *Id.* at 270. Third, “[t]he largest category  
9 of cases in which . . . the presumption against statutory retroactivity has [been applied] involve[s]  
10 new provisions affecting contractual or property rights, matters in which predictability and stability  
11 are of prime importance.” *Id.* at 271. Supreme Court precedent has explicitly indicated on  
12 numerous occasions that the right of parties to agree to arbitration is a *contractual* matter governed  
13 by contract law. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752-53 (2011);  
14 *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010).

15 After reviewing the relevant case law, this court finds that the Dodd-Frank Act’s SOX  
16 provisions are not retroactive. At the time Henderson and Masco agreed to the dispute resolution  
17 policy in 2007, they had the right to contract for the arbitration of SOX claims. *See Guyden v.*  
18 *Aetna, Inc.*, 544 F.3d 376, 384 (2d Cir. 2008); *Boss v. Salomon Smith Barney Inc.*, 263 F. Supp. 2d  
19 684, 685 (S.D.N.Y. 2003). Further, Henderson and Masco’s right to arbitrate SOX claims was  
20 reflected in their agreement, as the dispute resolution policy states that the arbitration provisions  
21 apply to “violation[s] of any federal . . . law.” Doc. #9, Exhibit B. The court does not see,  
22 therefore, how a retroactive revocation of the parties’ right to arbitrate SOX claims would *not*  
23 “impair rights [the parties] possessed when [they] acted.” *Landgraf*, 511 U.S. at 280. A retroactive  
24 application of Dodd-Frank’s SOX provisions would not merely affect the jurisdictional location in  
25 which such claims could be brought; it would fundamentally interfere with the parties’ contractual  
26 rights and would impair the “predictability and stability” of their earlier agreement. *Id.* at 271. For

1 these reasons, the court concludes that Henderson's right to arbitrate his SOX claim is not  
2 retroactively barred. Accordingly, the court finds that Henderson's SOX claim falls within the  
3 provisions of a valid arbitration agreement, and, recognizing the FAA's mandatory enforcement of  
4 such valid arbitration agreements, the court shall grant Henderson's motion to compel arbitration.

### 5 **C. Remaining Claims**

6 As the court has already found that Henderson's SOX claim is arbitrable under a valid  
7 arbitration agreement, the court finds that, in the interest of justice and in order to maximize the  
8 efficient use of judicial time and resources, Henderson's remaining claims should also be submitted  
9 to arbitration. Therefore, the court shall deny Masco's motion for judgment on the pleadings  
10 without prejudice.

### 11 **IV. Request for Attorney's Fees**

12 Under the Federal Rules of Civil Procedure, a party may submit a claim for attorney's fees  
13 to the court, by motion, no later than fourteen days after the entry of judgment. FED. R. CIV. P.  
14 54(d)(2)(A)-(B)(i). This provision implies that a final judgment on the merits is necessary prior to  
15 an award of attorney's fees. The motion for attorney's fees must also typically "specify the  
16 judgment and the statute, rule, or other grounds entitling the movant to the award." FED. R. CIV. P.  
17 54(d)(2)(B)(ii).

18 In the instant case, no judgment has been entered in favor of either party. Further,  
19 Henderson has cited no rule or statute justifying an award of attorney's fees. For these reasons, the  
20 court finds that Henderson's request for attorney's fees is both untimely and unsupported and, thus,  
21 shall deny the request without prejudice.

22  
23 IT IS THEREFORE ORDERED that plaintiff Timothy Henderson's motion to compel  
24 mediation and arbitration (Doc. #8) is hereby GRANTED in part and DENIED in part in  
25 accordance with this order. The action is STAYED pending arbitration of Henderson's claims.

26 IT IS FURTHER ORDERED that Timothy Henderson shall file a notice with the court

1 upon conclusion of arbitration.

2 IT IS FURTHER ORDERED that Masco Framing Corporation's motion for judgment on  
3 the pleadings (Doc. #11) is hereby DENIED without prejudice.

4 IT IS FURTHER ORDERED that if no further pleadings are filed in this action within the  
5 next thirty (30) days, that the Clerk shall administratively close this file and not reopen it until  
6 further order of the court or a notice of conclusion of arbitration is filed. The administrative closing  
7 shall be without prejudice to any party.

8 IT IS SO ORDERED.

9 DATED this 22nd day of July, 2011.



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12 LARRY R. HICKS  
13 UNITED STATES DISTRICT JUDGE  
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